



Environmental Stewardship



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Editorial – This newsletter is the most recent of a series inaugurated on December 1, 1993. It is dedicated to the sound practice of Environmental Stewardship, and has evolved through five transitions over ten years and eight volumes including a total of 69 issues. Their publication has been uninterrupted and free to a list of recipients as diverse as the topics with which they have dealt. Our sole theme is Environmental Stewardship – a vigilant concern for, and management of, all those human and natural factors that create and sustain the well being of the earth.

A number of those 69 issues contain articles recognized as particularly useful to our readers and those will be reprinted here as space permits. In addition, should you be aware of any relevant topic or source of information we should publish, please contact us at the editorial office listed below. – Ed.

The But for... Test and NEPA vs. Project Segmentation

But For ...

“But for ...” is a phrase often used by attorneys in tort cases, or in other types of liability cases. In medical malpractice, the plaintiff’s attorney says, “But for the actions of this doctor, my client would not have died.”

With respect to Environmental Planning and the NEPA process, this phrase evolved out of attempts to define and differentiate project impacts that are direct from those that are indirect (i.e. secondary) or cumulative. Staff of the Federal Highway Administration (FHWA), associate the test with secondary and cumulative impacts, such as projects in which “but for the construction of a proposed intersection, adjacent businesses and housing developments would not occur.” That relationship of the project being assessed and socioeconomic issues is not considered to be black or white, but rather, shades of gray. Therefore, although FHWA acknowledges that roadway improvement plays a role in spurring subsequent development, it believes that such projects do not carry the sole responsibility for those secondary or cumulative land use changes. For example, if 65% of secondary or cumulative development would happen without a project, the consequences in that 35% of the secondary impacts would be judged the probably responsibility of the proposed project. Based on that judgment, the project sponsors would be liable for 35% of any impact mitigation costs. In point of fact, general FHWA policy will consider mitigation only for direct secondary impacts of highway projects. In fact, it rarely deals with that consequence. FHWA takes the position that secondary and cumulative impacts, especially socioeconomic ones, are land use issues whose consequences are expected to be pre-thought and planned by local jurisdictions that control land use, and that public involvement and understanding of the dynamics and consequences of associated charges is presumed to be a given part of project planning at

¹ IES is dedicated to investigate and assess land use as it relates to the environment. It identifies and explains factors contributing to our relationship with the earth and it quantifies associated ecological consequences. It evaluates land use development and implementation plans. It conducts environmental audits, ecological monitoring, forensic investigations and it publishes information concerning these issues in the Public Trust.

the “local” level. Therefore, FHWA will not substitute its judgment for that of the local jurisdictions on issues of local land use planning. It takes the position that its primary responsibility is to make sure possible and predictable secondary and cumulative impacts are factored into NEPA decision-making and that those impacts are fully disclosed to the public in the NEPA process.

The “but for ...” test has been used by the US Corps of Engineers. An example is the assessment of a barge unloading terminal and the associated Corps Section 404 wetlands permit. If a power plant is adjacent to a river and the operator seeks a 404 Permit to build a barge facility to receive coal shipments, the USACOE will define the project assessment Area of Potential Effect (APE) to include the entire power plant facility, including the proposed barge site and its operation. “But for the permit to build a barge facility, there would be no power plant.” This logic thus extends USACOE permit influence/jurisdiction to the entire power plant facility. Both USACOE and the Federal Energy Regulatory Commission (FERC) have precedents that use the same logic in processing permits issuing from Section 106 of the Historic Preservation Act of 1966 (16 USC 470).

The Endangered Species Act of 1975 (15 USC 1531 et. Seq.) also contributes to the use of the “but for ...” test. Section 7 assessments of project impacts related to threatened or endangered species includes the same considerations as those defined above. The US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) have published a very useful “Endangered Species Consultation Handbook, March 1998”

<http://www.artba.org/public/docs/enviro/articles2/Sec%207%20Handbook.pdf>²

On page 108 of that publication, the “but for ...” test is defined. It states that: “As a practical matter, the analysis of whether other activities are interrelated to, or interdependent with, the proposed action under consultation should be conducted by applying the “but for” test. The biologist should ask whether another activity in question would occur “but for” the proposed action under consultation. If the answer is ‘no,’ that the activity in question would not occur but for the proposed action, then the activity is interrelated or interdependent and should be analyzed with the effects of the action. If the answer is ‘yes,’ that the activity in question would occur regardless of the proposed action under consultation, then the activity is not interdependent or interrelated and would not be analyzed with the effects of the action under consultation. There will be times when the answer to this question will not be apparent on its face. The biologist should ask follow-up questions to the relevant parties to determine the relationship of the activity to the proposed action under consultation. It is important to remember that interrelated or interdependent activities are measured against the **proposed action**. That is, the relevant inquiry is whether the activity in question should be analyzed with the effects of the action under consultation because it is interrelated to, or interdependent with, the proposed action. Be careful not to reverse the analysis by analyzing the relationship of the proposed action against the other activity. For example, as cited below, if the proposed action is the action of a second turbine to an existing dam, the question is whether the dam (the other activity) is interrelated to or interdependent with the proposed action (the addition of the turbine), not the reverse.

“Example: The Corps of Engineers requests consultation for construction of a dam which requires a Section 404 permit. The dam will provide water to private irrigation canals that will come on line once the dam is completed. The private irrigation canals are interrelated to the proposed dam and must be considered in a biological opinion for the larger water development project since they would not be in existence “but for” the presence of the proposed dam under consultation. Similarly, a power turbine to be constructed concurrently with the dam cannot function and has no independent utility “but for” the dam

² When online, you may view the source file of this hyperlink to the internet by double clicking on it.



and is, therefore, interrelated with the project. Thus, the effects of this turbine on fish passage and water quality are to be considered in the biological opinion of the proposed am. Ten years after construction of the dam, a general permit is needed to add a second turbine to the dam to increase power generation. The addition of the turbine, as the proposed action under consultation, is now the “larger action” against which the “but for” test for interrelated or interdependent effects would be applied. The pre-existing dam has independent utility without the new turbine and therefore is not interrelated to, or interdependent with, the proposed action. Ongoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation. Activities which would be interdependent and interrelated to the proposed turbine could include construction of new power lines or conversion of natural habitat if the additional power capacity allowed for the development of a manufacturing facility that was dependent upon the new power grid. Later, a new federal safety law requires the dam operator to construct a fuse plug on an existing spillway that improves response to emergency flood conditions. Construction of the fuse plug is now the proposed “larger action.” Again, the existing dam, is not interdependent or interrelated to the proposed fuse plug because it does not depend upon the proposed action for its existence. That is, the test is not whether the fuse plug in some way assists or facilitates in the continued operation of the pre-existing project, but instead whether the water project could not exist ‘but for ...’ the fuse plug. Because the answer is that the project would exist independent of the fuse plug, the operation of that project is not interrelated or interdependent. Accordingly, the biologist would not consider the effects of the dam to be effects of the ‘larger’ action under consultation (the proposed construction of the fuse plug). However, if the fuse plug would allow a greater flow of water through the spillway, thereby requiring the operator to increase the depth of the spillway channel and armor it with concrete, such activities would be interrelated to the proposed action.”

Project Segmentation

These perspectives of indirect (e.g. secondary) or cumulative impacts have become apparently intermingled with the concept of project segmentation, which is differently defined but of equal relevance to understanding the NEPA process. The confusion is encouraged by the tendency for project proponents to fragment a single project of multiple segments into its constituents and their treating a portion of the project as if it were a whole. Attempting to define that portion as being independent of the whole complex of interdependent constituents may be challenged on the grounds of “segmentation.” For example, a highway going from one terminus to another is subdivided and each such segment is assessed in isolation. The “Big Picture” of the whole highway is not disclosed. Consequently, EISs for such segmented projects misrepresent the otherwise consolidated sum of impacts from all its constituent pieces. Such misrepresentation makes the segmented project appear to have fewer and/or less significant impacts than were all its pieces and their consequences considered as a whole.

FHWA has promulgated three tests in order to define whole and unsegmented projects. Passing the tests listed here [23 CFR 771.111(f)] helps FHWA avoid giving segmented projects its approval.

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, i.e. be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

The difference between the “but for ...” test and project segmentation tests is mind bending! The former helps identify any and all present, past, and future interrelated and interdependent actions that define the



full context of a project. It is appropriate in identifying sources of secondary and cumulative impacts of a project. The latter defines those future interrelated and interdependent actions that constitute a single proposed project as required by the NEPA process. It helps identify direct, indirect, and cumulative impacts of a proposed project (40 CFR 1508.7 and 8).

Preparation and Recovery from Natural and Man-made Disasters

The Federal Highway Administration (FHWA) Office of Operations is engaged in emergency preparedness and management, working with other DOT administrations and Federal agencies, its State and local partners, academia, industry associations, and the private sector. The purpose is to ensure that surface transportation operating agencies throughout the United States have the necessary tools, techniques, information, and understanding to be able to prevent when possible, prepare for, respond to, and recover from both natural and man-made disasters. A key element is "emergency transportation operations preparedness." A new web site has been created to help assure this goal:

<http://www.ops.fhwa.dot.gov/OpsSecurity>³

Additional information is contained in the [Public Safety and Security Program Brochure](#).⁴

Environmental Stewardship Quotes, Quips, Etceteras

Experience enables you to recognize a mistake when you make it again.

. – Robert Phillips



³ When online, you may view the source file of this hyperlink to the internet by double clicking on it.

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